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5 Attorney for Defendant

6 Raymond Diaz

7 UNITED STATES DISTRICT COURT

8 FOR THE CENTRAL DISTRICT OF CALIFORNIA

9 WESTERN DIVISION

10 UNITED STATES OF AMERICA,)

11)
Plaintiff,)

12 vs.)

13 RAYMOND DIAZ,)

14)
Defendant.)

Case No.: 5:18-CR-00171 TJH (02)

) DEFENDANT'S POSITION RE

) SENTENCING AND OBJECTIONS TO

) PRESENTENCE REPORT AND

) RECOMMENDATION;

) MEMORANDUM OF POINTS AND

) AUTHORITIES

) Sentencing Hearing: 16 March 2020

) Hearing Time: 10:00

) Courtroom: 9B First Street

) Hon. Terry J. Hatter, Jr.

19 Defendant Raymond Diaz, by and through his attorney of record in this case,

20 David J. Kaloyanides, hereby submits this Position re Sentencing and Objections to

21 the Presentence Report and Recommendation and the accompanying Memorandum

22 of Points and Authorities in support.

1 Based on an analysis of the sentencing factors set forth in 18 U.S.C. §3553(a),
2 including an analysis of the advisory Sentencing Guidelines sentencing range, the
3 appropriate sentence for defendant in this case is time served of one day to be
4 followed by Supervised Release for a term of 3 years on the terms and conditions set
5 forth in the Sentencing Recommendation Letter from the United States Probation
6 Office , a special assessment of \$100.00 which is mandatory, restitution in the
7 amount of \$591.86, and a waiver of all fines as defendant lacks the ability to pay any
8 fine.
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10 Defendant reserves the right to supplement the arguments in support of the
11 sentencing position up to and including the date of sentencing.
12

13 Respectfully submitted,

14 Date: 3 March 2020

15 s/ David J. Kaloyanides

16 David J. Kaloyanides
17 Attorney for Defendant
18 Raymond Diaz
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The most effective means of achieving the goals of sentencing in this case is to provide continued rehabilitation and treatment for Mr. Diaz. A time served sentence to account for the one-day of custody Mr. Diaz has served allows the Court to craft a term of Supervised Release that will allow Mr. Diaz to continue his rehabilitation and treatment that the Court has afforded him throughout this case. Mr. Diaz's treatment on pretrial release had a bumpy start. However, as the Court has seen, with time he has improved. Over time, he has deepened his commitment to freeing himself from his addiction disease. While his progress is not without set-backs, his progress continues. The Court should craft a sentence that allows that progress to continue, for then the goals of sentencing will be met.

The Court should impose a time-served sentence of one-day to be followed by a 3 year term of Supervised Release. The mandatory special assessment of \$100.00 is mandatory and must be imposed. The Court should order restitution in the amount of \$591.86 payable to Fingerhut. And the Court should waive all fines, as Mr. Diaz lacks the ability to pay a fine.

II. BACKGROUND FACTS

Mr. Diaz was charged in three counts of a Six Count Indictment filed 6 June 2018. The Indictment also named Mr. Diaz's uncle, Ernesto Diaz, charging him with

1 violations of 18 U.S.C. §922(g)(1), felon in possession of a firearm, 18 U.S.C.
2 §1029(a)(2), use of unauthorized access device with intent to defraud, and 18 U.S.C.
3 §1028A, aggravated identity theft. Mr. Raymond Diaz was not named in these three
4 counts alleged against his uncle.

5 Mr. Raymond Diaz was named in three separate counts, namely 18 U.S.C.
6 §1344, bank fraud, 18 U.S.C. §1028A, aggravated identity theft, and 18 U.S.C.
7 §1029(a)(3), possession of at least fifteen unauthorized access devices.

8 This case in reality constituted two separate cases—the offense conduct of Mr.
9 Raymond Diaz was separate from that of his uncle. The only link between them was
10 that Raymond Diaz was engaging in his conduct at his uncle’s home at the time
11 federal law enforcement officers executed a search warrant at the uncle’s home
12 relating to an investigation into the uncle’s criminal activities. Raymond Diaz was
13 never a target of the investigation. He happened to be at the residence at the time.
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15 Mr. Diaz had taken his father-in-law’s information, used it to purchase
16 \$591.86 worth of merchandize, and open a PayPal Credit Account without
17 authorization. At the time of the search, law enforcement officers also found a file
18 folder or document binder containing paperwork that included the names, addresses
19 and Social Security numbers of 32 individuals. There is no information that Mr. Diaz
20 was attempting to use any of that information as part of his offense conduct in
21 opening the PayPal Credit Card account in the name of his father-in-law.
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1 On 9 January 2019, Mr. Diaz entered a plea agreement with the government,
2 which was subsequently filed on 14 January. Because of Mr. Diaz's on-going drug
3 treatment issues while on pretrial release, Mr. Diaz did not formally enter his change
4 of plea until 18 December 2019.

5 Pursuant to the Plea Agreement, Mr. Diaz pled guilty to Count Four of the
6 Indictment, which charged him with bank fraud in violation of 18 U.S.C. §1344(2).
7 Mr. Diaz admitted that he obtained his father-in-law's personal identifying
8 information and used that information to open a PayPal Credit account without
9 permission, thereby falsely representing to PayPal Credit and Comenity Capital Bank
10 that he was authorized to open the account and use the account. Mr. Diaz also
11 admitted that at the time law enforcement officers executed the search warrant, he
12 had possession of personal identifying information of 32 other people, which included
13 names, address, and Social Security numbers.
14

15 Mr. Diaz and the government stipulated that under the advisory Sentencing
16 Guidelines, the Base Offense Level was 7, pursuant to U.S.S.G. §2B1.1(a)(1), and
17 that a two-level increase should be applied under §2B1.1(b)(1)(B) because the
18 intended loss was over \$6,500.00. The parties reserved the right to argue for
19 additional specific offense characteristics, adjustments and departures as well as to
20 argue for a sentence outside the sentencing range established by the advisory
21 Sentencing Guidelines.
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1 The government agreed to move to dismiss the remaining counts against Mr.
2 Diaz at the time of sentencing. The parties also stipulated that Mr. Diaz would be
3 required to pay restitution, which the parties estimated was \$2,548.70, while
4 agreeing that the restitution amount was subject to change based on additional
5 evidence that might be presented.
6

7 The plea agreement also included a waiver of appeal of the conviction and a
8 limited mutual waiver of appeal of the sentence. However, the Court did not accept
9 those provisions as part of accepting the plea.

10 The Presentence Report and Recommendation were disclosed 10 February
11 2020. The Probation Office calculated the Base Offense Level at 7 but did not find
12 that the two-level increase for loss exceeding \$6,500 applied because the Probation
13 Office did not receive information sufficient to establish the total intended loss
14 attributable to Mr. Diaz as compared with his uncle. The Probation Office used the
15 amount of \$591.86 that it could determined was the actual loss as the total loss
16 amount.
17

18 However, the Probation Office concluded that a two-level increase should be
19 applied under §2B1.1(b)(11)(C)(i) because Mr. Diaz used another person's
20 information to open the PayPal Credit account. After adjusting the offense level for
21 acceptance of responsibility, the Probation Office concluded that the Total Adjusted
22 Offense Level was 7.
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1 The Probation Office calculated Mr. Diaz's criminal history points at 4
2 resulting in a Criminal History Category of III. The advisory Sentencing Guideline
3 Range for Offense Level 7 Criminal History Category III is 4 to 10 months.

4 As the Court is well-aware, Mr. Diaz struggled with his substance abuse issues
5 during his pretrial release. He has undergone several treatment programs including
6 intensive outpatient as well as residential drug treatment. Over time, Mr. Diaz has
7 been able to do better in treatment and with the residential programs and his current
8 outpatient treatment. He sought programs on his own as well as through Pretrial
9 Services, and he has continued with both his substance abuse treatment and mental
10 health therapy. While he has had some setbacks, he has progressed during the time of
11 his pretrial supervision.
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13 On 19 February, Mr. Diaz interviewed with the United States Probation Office
14 to complete the Presentence Report and Recommendation. Mr. Diaz discussed the
15 tragic details of his troubled upbringing. His parents both suffered from addiction
16 disease. His mother was addicted to crack cocaine and methamphetamine and
17 suffered from bipolar disorder and schizophrenia. His father was addicted to
18 methamphetamine alone. Because of the drug abuse, Mr. Diaz was taken from his
19 parents when he was only 4 years old. He was raised by his grandmother from that
20 time.
21

22 Unfortunately, his grandmother also struggled as most of her children also
23 were dealing with drug abuse and were active in gang life in South Gate. Ultimately,
24

1 Mr. Diaz and his grandmother were forced to move to escape the neighborhood's
2 gang and drug problems.

3 Mr. Diaz suffered additional trauma in elementary school. In third grade, in an
4 after school program, he was gang-raped by three older boys in the program. He
5 never told anyone about the attack until he was 14 years old. It was at the time he
6 came out to his family that he was gay when he also told them about the assault. Yet
7 instead of providing the love and support that one would expect from a family, Mr.
8 Diaz was ostracized. Consequently, he looked for support from other young people
9 who turned out to be a dangerous influence on him. At this young age he began
10 drinking and experimenting with drugs to fit in. However, none of this provided him
11 with the support he needed. He attempted suicide during this period.
12

13 Mr. Diaz was around 13 when he first started smoking marijuana. By age 16,
14 he was using methamphetamine. Mr. Diaz's addiction grew into a daily marijuana
15 use as well as a daily methamphetamine habit of 3.5 grams—a \$200 per week
16 habit—until the day of his arrest in this case.
17

18 As the Court is aware, Mr. Diaz has struggled through his pretrial supervision
19 with his addiction disease. However, but for a marijuana use over the holidays, Mr.
20 Diaz has been progressing well. He knows what his issues are and what steps he
21 needs to take in order to continue to improve. He is committed to his rehabilitation
22 and treatment, and understands that this is critical for his success in life.
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1 III. DISCUSSION

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3 A. OBJECTIONS TO THE PRESENTENCE REPORT AND
4 RECOMMENDATION

5 Mr. Diaz has no objection to the PSR's calculation of the Total Adjusted
6 Offense Level of 7.

7 Mr. Diaz has no objection to the PSR's calculation of the criminal history
8 points or the Criminal History Category of III.

9 As of the filing of this Sentencing Position, Mr. Diaz has not received a
10 revised PSR that includes the information from his presentence interview.
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13 B. STATUTORY SENTENCING FACTORS

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15 The fundamental principle at sentencing is that the District Court must begin
16 by correctly calculating the applicable Guidelines range. *See Gall v. United States*,
17 552 U.S. 38, 49, 128 S. Ct. 586, 596, 169 L. Ed. 2d 445 (2007). Calculating the
18 advisory Guideline offense level and sentencing range is the beginning of the
19 analysis in sentencing and "the benchmark" for determining the appropriate
20 sentence. *See Kimbrough v. United States*, 552 U.S. 85, 108, 128 S. Ct. 558, 169 L.
21 Ed. 2d 481 (2007). The Court's application of the Sentencing Guidelines to those
22 factual findings are a matter of the sentencing Court's sound discretion. *See United*
23 *States v. Augare*, 800 F.3d 11873, 1174 (9th Cir. 2015).
24

1 The correctly calculated advisory Guideline Sentencing Range in this case is
2 4-10 months imprisonment. As the Court has seen from Mr. Diaz over the last year
3 of his pretrial release, he has suffered from a serious methamphetamine addiction. It
4 is this addiction that contributed in significant part to the offense conduct in this
5 case.

6
7 When considering the goals of sentencing as set forth in §3553(a), the Court
8 should not elevate any one goal over another. All the goals of sentencing—punitive,
9 rehabilitative, deterrence—all should be given equal weight in determining the
10 appropriate, fair and just sentence. What is clear in this case is that treating Mr.
11 Diaz’s serious drug addiction is the best means of achieving most of those goals.
12 Allowing Mr. Diaz to continue his treatment and drug rehabilitation, his mental
13 health treatment and therapy, will achieve the goals of protecting society and
14 preventing recidivism because Mr. Diaz will no longer be in the cycle of criminal
15 conduct resulting from the need to feed his addiction disease. His rehabilitation and
16 therapy is giving him the life skills and tools to help him move toward a productive
17 life in society thereby ensuring he will not commit crimes in the future.

18
19 The proposed sentence of time served of one-day to be followed by a 3 year
20 term of supervised release promotes respect for the law because this sentence is
21 designed to address the Mr. Diaz’s individual circumstances. Society is encouraged
22 to respect the law when the law is fair in principle and as applied. Seeing that our
23 criminal justice system is not solely about punishment helps garner support for and
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1 respect of the law that allows the Court to craft sentences to address the underlying
2 causes of and factors contributing to criminal behavior.

3 This is not to say that Mr. Diaz's offense is not serious. Using another
4 person's personal identifying information for fraud creates significant hardship for
5 the individual victim, financial institutions involved, as well as society's trust in
6 those institutions. Punishment for this type of criminal conduct is necessary to
7 communicate not only to the defendant but to society that such conduct will not be
8 tolerated.

10 But punishment must be fair. The sentence imposed for any criminal offense
11 must be sufficient but not greater than necessary to achieve all the goals of
12 sentencing. *See* 18 U.S.C. §3553(a). Here, the question for the Court to determine is
13 what, if any, goal is served by an additional four months of custody? Custody is not
14 the only form of punishment. A 3-year term of Supervised Release is a form of
15 punishment as it substantially restricts one's individual liberties and constitutional
16 rights. And the request for a 3-year term of Supervised Release, which is more than
17 what Probation is seeking, is designed to take into account what is truly needed in
18 this case—continued treatment and rehabilitation to ensure that Mr. Diaz comes
19 through this experience able to engage in society productively as a law-abiding
20 citizen.

23 To this end, Mr. Diaz requests that the Court recommend that he be evaluated
24 for the Court's Substance Abuse Treatment and Reentry Program (STAR). This

1 program would best serve Mr. Diaz's needs and further the goals of sentencing to
2 protect the public, provide Mr. Diaz with needed treatment, guard against recidivism,
3 while taking into account the severity of the offense in light of Mr. Diaz's own
4 background and personal circumstances in a just and fair manner.

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7 IV. CONCLUSION.

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9 Accordingly, the Court should impose a sentence of time served of one-day to
10 be followed by a 3-year term of Supervised Release. The Court must impose a
11 \$100.00 special assessment as that is mandatory. The Court should order resitution in
12 the amount of \$591.86 and order that all fines should be waived, as Mr. Diaz lacks
13 the ability to pay any fine. Finally, the Court should recommend that Mr. Diaz be
14 evaluated for the STAR program.

15 Respectfully submitted,

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17 Date: 3 March 2020

s/ *David J. Kaloyanides*

18 David J. Kaloyanides
19 Attorney for Defendant
20 Raymond Diaz
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